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is negligence, and the carrier is liable, though the loss actually occurred beyond the line of such carrier.

3. **PRINCIPAL AND AGENT.**—The vendor of stock, who contracts to deliver the same to a railroad company for shipment on account of the purchaser, is not the agent of the purchaser in making such delivery.

NORFOLK & WESTERN RAILROAD COMPANY V. MILLS & FAIRFAX.—

Decided at Wytheville, July 11, 1895.—*Cardwell, J.*

1. **APPELLATE COURT**—*Second appeal—effect of prior decision.* On a second appeal, or writ of error, in the same case, every proposition of law decided on the first appeal, or writ of error, is binding on the appellate court whenever that case comes before it for adjudication. It is *res judicata*. But in order that a proposition may be considered as decided, it must appear that there was an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties. Applying this rule to the case in judgment, the decision on the former writ of error settled and decided the true construction of the contract in suit, and fixed the relative rights of the parties thereto.

2. **APPELLATE COURT**—*Objections to evidence not made at the time.* Objections to the introduction of evidence not made at the time cannot be considered by the appellate court.

3. **APPELLATE COURT**—*Verdict of jury.* The appellate court will not interfere with the verdict of a jury unless it appears that it was rendered plainly against the evidence, or without evidence.

4. **AWARD**—*Engineer's estimates—fraud or mistake.* Although a contract between two parties stipulates that in all questions connected with certain estimates required by the contract to be made, and the amounts payable by and under the contract, the decision of the engineer of one of the parties shall be final and conclusive on all parties; and that upon the final estimates of such engineer certain releases shall be secured by the other party before receiving the *per cent.* of money reserved by the terms of the contract, yet if the conduct of such engineer was fraudulent, or he was guilty of a mistake so gross as to amount to a fraud on the rights of the opposing party, the latter is not bound by such estimates and need not tender such releases, but may maintain his action on the contract to recover the true amount due him.

5. **TENDER**—*Willingness to pay—payment into court.* A willingness to pay the amount admitted to be due is not the equivalent of a legal tender of the amount and it is not made a legal tender by bringing the money into court.

6. **INSTRUCTIONS**—*When not error to instruct.* It is not error to refuse to give instructions asked for by a party to a suit, when substantially the same ground is covered by other instructions given by the court. But where only constructive fraud on part of the defendant is necessary to entitle the plaintiffs to recover, it is error to give an instruction which involves the idea that willful or actual fraud is necessary.

7. **JURIES ARE THE TRIERS OF FACTS, UNDER PROPER INSTRUCTIONS FROM COURT.**—Whether the plaintiff was entitled to recover the higher or lower of two

prices fixed by a contract for different classes of work, or whether he had waived or abandoned his right to recover the higher price, were questions of fact which were properly left to the determination of the jury, under instructions which correctly propounded the law and gave them great latitude in the range of their inquiry. *American Manganese Company v. Virginia Manganese Company*, distinguished.

8. CASE AT BAR—*Modification of contract—change in method of work—engineer's monthly estimates—receipts in full—releases.* Under the evidence certified, considered as upon a demurrer to the evidence by the plaintiff in error, the defendant in error was entitled to recover the higher price fixed by the contract for the work performed by him, and there has been no such modification of the terms of the contract or change in the mode of doing the work, acquiesced in by the defendant in error, as would deprive him of the higher price called for by the contract, nor is he debarred from such recovery by accepting and receipting for the monthly estimates of the engineer at the lower figure. Nor was the defendant in error debarred from instituting this action by reason of failure to tender the releases required by the contract.

Buchanan, J., dissenting: The decision of the chief engineer was final and conclusive on all parties, unless he was guilty of fraud or of a mistake so gross as to amount to fraud. This question was properly submitted to the jury. But even if guilty of such mistake, still the conduct of the plaintiff, although he was not satisfied with the determination of the engineer, was such as to preclude him from recovery in this action. The jury were also erroneously instructed on the subject of fraud and mistake on the part of the engineer.

HUGHES' ADM'R AND OTHERS V. PATTERSON'S EX'OR.—Decided at Wytheville, July 11, 1895.—*Buchanan, J.*:

1. SATISFACTION—*Collateral agreement partly performed—compensation.* Where a debtor has agreed to do a collateral thing in satisfaction of his bond to his creditor, and dies after having partially performed the agreement, the bond should not be treated as paid, but the debtor should have credit thereon for the money paid, or the value of the services rendered in pursuance of the agreement.